IN THE

# Supreme Court of the United States

OCTOBER TERM, 1955
No. 924

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A Proceeding for Reorganization Under Chapter X
of the Bankruptcy Act
No. 90460

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In the Matter
of
HUDSON & MANHATTAN RAILROAD COMPANY,
Debtor-Petitioner.

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WILLIAM J. HARDING, JR., IRVING I. SCHNUR
and SHIRLEY REITER,
Petitioning Creditors, Respondents.

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## PETITIONER'S REPLY BRIEF

Respondents (Petitioning Creditors) on p. 4 of their opposing brief state:

> "The jurisdiction of the District Court to reorganize the Debtor under Chapter X was finally and conclusively established by the order denying the motion to dismiss and by the order dismissing the Debtor's petition for reorganization under Section 77."

The whole body of federal law is uniform in requiring that federal jurisdiction must affirmatively appear in the

record. The record will be searched in vain for the existence of the facts upon which federal jurisdiction here is claimed to depend, namely, that the debtor committed acts of bankruptcy by making preferential payments while insolvent. Those facts are merely averred, and they stand denied and unproved of record.

Respondents' suggestion that the question is *res judicata* and can therefore no longer be raised has no merit. The denial of a motion to dismiss [1] for want of jurisdiction is not and never has been a bar to thereafter raising the same issue on the merits in the answer, and the expiration of the time to appeal from the adverse decision of the motion does not affect the matter.

> "The new Rules have made no change in the law concerning the effect of overruling a motion based on jurisdiction, venue or process. The party simply answers over, preserving his objection, and in the event of an adverse judgment, may raise the point on appeal." 16 Cal. State Bar Journal 153.
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> "Rule 12(h) simply means that you can raise certain defenses mentioned even though raised before in an earlier stage of the pleadings. If you start with a motion—which you are not bound to make at all—and raise the first five points in 12(b), then raise the sixth ground and are overruled, you could put the sixth in your answer when it is filed, and then make a motion for judgment on the pleadings, and get another hearing on it." 4 John Marshall L. Q. 291.

The respondents also say (p. 4, opposing brief): that the "order dismissing the Debtor's petition for reorganiza-

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[1] The debtor's motion to dismiss was decided on affidavits, not on proof.

> "* * * allegations are not proof and though a motion under Rule 12 may dispose quickly and properly of many such suits, such a motion cannot take the place of proof" (*Cold Metal Process Co.* v. *United Eng. Co.* (C. A. 3, 1950), 197 F. 2d 217, 221).

tion under Section 77 * * * is a final adjudication of the Section 77 issue, and is not subject to collateral attack. (Stoll v. Gottlieb, 305 U. S. 165.)"

This is a specious suggestion. We do not challenge the jurisdiction of the Court to act in the Chapter VIII proceeding. We challenge the jurisdiction of the Court to act in *this* proceeding, and that is not a collateral attack, but a frontal assault, a direct jurisdictional attack in the same Chapter X proceeding between the same parties, in the same Court and before the same judge who is by statute and by local rule vested with the exclusive jurisdiction of the proceeding and who refused to try the jurisdictional issue raised by the Debtor's denials. (Cf. *Page* v. *Wright*, 116 F. 2d 449, 454.)

Moreover, if the decision of a motion in a proceeding, *any* motion, can foreclose an inquiry as to the actual existence of those facts which are averred in the petition to support jurisdiction of the subject matter, then F.R.C.P. Rule 12(h) and the statute (Bankruptcy Act § 143) requiring dismissal where jurisdiction of the subject matter is absent, will stand nullified.

The petitioning creditors further say (opposing brief, p. 6):

> "An involuntary petition under Chapter X must allege an act of bankruptcy. But the debtor can relieve the petitioning creditors of the burden of proving the alleged act of bankruptcy by filing an answer which embodies the substance of a voluntary petition."[2]

[2] The respondents say that "Such an answer is itself an act of bankruptcy under Section 3a(6).

> "* * * the act of bankruptcy, *to form the basis for jurisdiction* must have been committed within four months *previous* to the filing of the petition" (*In re Rialto Properties Co.*, 8 F. Supp. 57).

But the petitioning creditors cannot be relieved of proving t he facts on which jurisdiction depends when the allegations of those jurisdictional facts stand specifically denied. This is precisely what the Supreme Court said in *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 189:

> "The authority which the statute vests in the Court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof."

There can be no more "appropriate manner" of challenging allegations of jurisdictional facts than by specific denials in a pleading.

It remains the incontrovertable fact that the actual existence of jurisdictional facts was at issue when the Court approved the petition and that the issue was never resolved. The judge could not approve the petition if those acts of bankruptcy did not in fact exist (§ 131).

> "A Court does not have the power by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted by its creators." (*Stoll* v. *Gottlieb*, 306 U. S. 165, 171.)

It is said that the time to appeal from the order denying the motion to dismiss for lack of jurisdiction has long since expired and it is now too late to raise the question.

It is never too late to raise the question of federal jurisdiction—it may be raised at any time, at trial or appellate stage. The question, as we have seen, is ever present and self-asserting and needs no stimulus from the debtor to require resolution by the court.

Finally, the respondents lean heavily on § 149. But we have seen from page 29 of the petition for certiorari that the constitutional and statutory limitation upon federal jurisdiction requiring that "any time" the question of federal jurisdiction appears, all proceedings on the merits must stop until the question is determined, is so in conflict with the construction which the courts below placed on Sec. 149 as to present a question which has not been but ought to be settled by this court.

## CONCLUSION

**There has been no showing that federal jurisdiction affirmatively appears in the record. This is fatal to the judgment below. Certiorari should therefore be granted.**

Respectfully submitted,

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